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In The

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner challenges the Hawaii requirement that voters electing trustees of OHA be Hawaiian, but does not challenge the constitutionality of OHA's trust mandate to better the conditions of Hawaiians and native Hawaiians. The Question Presented is:

Whether it is permissible under the Fourteenth and Fifteenth Amendments to allow only those persons who are the beneficiaries of historically-rooted trust obligations – obligations to native Hawaiians and Hawaiians that are unchallenged – to vote for the trustees of the entity created to carry out those trust obligations?

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INTRODUCTION

Petitioner's scare tactic of attempting to paint this case as involving pernicious invidious discrimination akin to "whites-only" racism is appalling. No reasonable person could construe the voter restriction allowing only Hawaiians and native Hawaiians[1] to elect Office of Hawaiian Affairs (OHA) trustees designed to fulfill historically-rooted trust obligations to Hawaiians and native Hawaiians as even approaching anything like "whites-only" type discrimination.

Nor does this case fall within the "affirmative action" type of race-based distinctions subjected to strict scrutiny by *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) or *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). Those cases simply did not involve the governmental fulfillment of a historically-rooted trust obligation to an aboriginal people; a trust obligation rooted in the desire to assist these people because they were the displaced subjects of a former, but since conquered, independent sovereign. It is because of this unique and critical history, shared by both Indians and Hawaiians and native Hawaiians, that this Court in *Morton v. Mancari,* 417 U.S. 535 (1974), and its progeny, appropriately held that classifications designed to fulfill that vital trust obligation are subjected to mere rational basis review. *Adarand* and *Croson* simply do not address this unique situation. In any event, the Ninth Circuit correctly held that even if

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[1] The State of Hawaii will use the terms "native Hawaiian" and "Hawaiian" in accord with Hawaii Revised Statutes (HRS) § 10-2, as does petitioner. "Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. "Hawaiian" means any descendant, even if not one-half part or more.

strict scrutiny were applied, the voting restriction met that test.

Most importantly, this case does *not* even raise the question petitioner attempts to foist upon this Court: whether Hawaii may constitutionally set aside land and money in trust, under the control of OHA, exclusively for the benefit of Hawaiians and native Hawaiians (and in turn whether limiting those who can vote for the OHA trustees to Hawaiians and native Hawaiians is constitutional). Why not? Because as the Ninth Circuit Court recognized, the set aside in trust exclusively for the benefit of Hawaiians and native Hawaiians was *not* challenged in this case, and must be presumed to be constitutional.

Indeed, the record, which was developed for an attack solely upon the voter restriction, does not provide any basis for reviewing the constitutional validity of the underlying trust itself, and petitioner to this day does not and cannot challenge it. Once this is understood, the question in this case boils down to a simple one: whether voters electing OHA trustees to manage property in trust for the exclusive benefit of Hawaiians and native Hawaiians – where the benefiting of those groups exclusively is presumed constitutional – may be similarly limited to the same beneficiary group, Hawaiians and native Hawaiians. The answer to *that* question, which is the only one presented here, is clearly "yes," and does not warrant this Court's review.

STATEMENT OF THE CASE

The issue in this case is whether the voter restriction violates petitioner's rights under the Fourteenth and Fifteenth Amendments when the similarly restricted OHA

administrative structure and underlying trust obligations are not challenged.

1. Proceedings Below.

As to the Fourteenth Amendment, the District court found that the voting restriction was based not upon race but upon recognition of the unique status of native Hawaiians, based on the trust obligations owed and directed by Congress and the State of Hawaii. The court found the restriction rationally related to the fulfillment of the unique obligations to native Hawaiians. As to the Fifteenth Amendment, the court found that the election of OHA trustees qualified as a special purpose election that allowed limiting the electorate.

On appeal, the Ninth Circuit emphasized, and relied heavily upon, the fact that "the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case," and that, accordingly, "we must accept the trusts and their administrative structure as we find them, and assume that both are lawful." Petition (Pet.) at 9a.

> If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be. Put another way, the voting restriction is not

> primarily racial, but legal or political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

Pet. at 9a-10a. The Ninth Circuit, after finding the principles of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (special purpose election), and *Morton* (which requires only a rational basis for Indian preferences to survive equal protection challenge) to be applicable, went on to hold that the voting restriction would survive even strict scrutiny because it serves "the state's compelling responsibility to honor the trust" and "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.' " Pet. at 17a.

2. Historical Facts.

An understanding of the correctness of both lower court decisions requires an understanding of events in Hawaii history relevant to petitioner's claim.

a. The Public Lands

Hawaii was an independent kingdom from 1810 until 1893. The monarchy was overthrown in 1893 and replaced by a provisional government, which declared itself the Republic of Hawaii and sought annexation to the United States. In the Annexation Act of 1898 (also known as the Newlands Resolution), the United States accepted the cessation of the sovereignty of Hawaii. 30 Stat. 750, Act of July 7, 1898. Pet. at 3a-4a.

As a result of the overthrow, loss of sovereignty, and annexation, roughly 1,800,000 acres of crown, government, and public lands from the monarchy were ceded by the Republic of Hawaii to the United States.[2] The Annexation Act provided that all revenues or proceeds of the public lands (except for portions required by the United States) shall "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Pet. at 4a.

The post-annexation Organic Act established the Territory of Hawaii. 31 Stat. 141 (1900). Pet. at 4a. The Organic Act confirmed that the public lands ceded to the United States by the Annexation Act remained in the possession, use, and control of the government of the Territory of Hawaii for public works and other public purposes. Organic Act §§ 73, 91. Pet. at 4a.

b. The Hawaiian Homes Commission Act, 1920

The Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921) ("HHCA"), Appendix (App.) A2-A4, set aside more than 200,000 acres of the public trust lands of the Territory of Hawaii as "available lands" for longterm nominal price leases to native Hawaiians. Pet. at 4a; App. A4. *Congress* defined native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7); App. A3.

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[2] These events later led to an apology on behalf of the United States for the overthrow of the Kingdom of Hawaii. Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993). Pet. at 13a.

> The bill seeks to rehabilitate the Hawaiian race by placing Hawaiian families back on the land. A considerable portion of the land once known as the "Hawaiian Crown lands" . . . is available for lease to Hawaiians for homestead purposes. . . .
>
> The Hawaiian race is fast declining. Statistics indicate that within the course of a few years the race will become extinct unless some method can be adopted to check the decrease.

H.R. Rep. No. 236 at 1 (1921) (67th Cong. 1st Sess.).

The HHCA available lands are held in trust for the benefit of native Hawaiians. *See Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982) (Hawaiian Homes Commission has fiduciary trust obligation benefiting native Hawaiians as aboriginal peoples).

c. The Admission Act

Hawaii was admitted as a state in 1959 by way of the Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959), and presidential proclamation. App. A1. The Admission Act imposed two conditions on statehood that are important to this case.

First, section 4 of the Admission Act establishes a "compact" between the State of Hawaii and the United States concerning the Hawaiian *homelands*. App. A1. Specifically, the "available lands" designated in the HHCA were transferred to the State of Hawaii. The State of Hawaii was required to adopt the HHCA, *including Congress' definition of native Hawaiian*, as part of the Hawaii Constitution. This was done. Haw. Const. art. XII § 1. Pet. at 4a. The State of Hawaii may make administrative changes to the HHCA, but may not without the consent of the United States make substantive changes that

decrease the benefits for native Hawaiians. Admission Act § 4; *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986) (unlike typical provision of state law, trust obligation protected from amendment).

Second, section 5(f) of the Admission Act establishes a public land trust on certain lands (and the proceeds from those lands) granted or conveyed to the State of Hawaii by the United States under sections 5(b) and 5(e).[3] Pet. at 48a. The State of Hawaii holds the section 5(f) trust lands for five purposes. One is *"for the betterment of the conditions of native Hawaiians."* Admission Act § 5(f); *see Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). The other four are: 1) for the support of public schools and other public institutions; 2) for the development of farm and home ownership; 3) for the making of public improvements; and 4) for the provision of lands for public use. *Id.*

While section 5(f) identifies the five purposes of the public land trust, it does not explicitly require that all five be supported in any specific proportion. Section 5(f) provides that the trust lands, proceeds and income shall be used "for one or more" of the five purposes "in such manner as the constitution and laws of said State may provide. . . . " Pet. at 48a.

From statehood in 1959 until the 1978 constitutional convention, none of the section 5(f) public trust lands or

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[3] The section 5(b) lands are basically the lands ceded to the United States at annexation (including the lands designated as "available lands" by the HHCA). The section 5(e) lands are lands retained by the United States at statehood and subsequently conveyed to the State of Hawaii, upon a presidential determination that the land is no longer needed by the United States.

monies (apart from the HHCA lands) was used for the betterment of the conditions of native Hawaiians. *See* Pet. at 5a.

d. Office of Hawaiian Affairs

Three amendments to the Hawaii Constitution that are relevant to this case were adopted in 1978. (1) Article XII, Section 4 defines the public land trust as the 5(f) trust lands excluding the HHCA lands and specifically states that native Hawaiians (and the "general public") are beneficiaries of the section 5(f) public trust.[4] The amendment thus makes clear that the section 5(f) purpose of "the betterment of the conditions of native Hawaiians" was *not* satisfied exclusively with the HHCA "available lands" in the section 5(b) lands. Article XII, Section 4 clarifies that native Hawaiians are beneficiaries of the public land trust in addition to whatever benefits they receive from the HHCA "available lands." *See* 1979 *Haw. Sen. J.* 1350, 1351 (Standing Comm. Rept. 784).[5]

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[4] Article XII Section 4, entitled "Public Trust," provides:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the [HHCA], shall be held by the State as a public trust for native Hawaiians and the general public.

[5] The HHCA available lands retain their identity as trust lands separate from the public land trust. *See Price v. Akaka*, 928 F.2d 824, 826 n.1 (9th Cir.), *cert. denied*, 502 U.S. 967 (1991) (public land trust does not include the homelands). The discharge of the State of Hawaii's trust obligations under the HHCA is the responsibility of the State of Hawaii *Department of Hawaiian Home Lands*, and not the responsibility of OHA.

(2) Article XII, Section 5 establishes the Office of Hawaiian Affairs and provides that it shall hold title to all real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. Pet. at 46a. Section 5 also contains the provision challenged in this case that "[t]here shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law."

The committee of the 1978 constitutional convention that drafted this voting provision explained it in terms of trustee accountability to trust beneficiaries:

> Your Committee is unanimously and strongly of the opinion that people to whom assets belong should have control over them. After much deliberation and attention to testimony from all parts of the State, your Committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. . . .
>
> Finally, the committee agreed that the board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society.

1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, Standing Comm. Rept. No. 59, 643, 644-45 ("Proceedings"). The 1979 legislature enacted HRS § 13D-3(b), which repeats the requirement that voters for the OHA

board be Hawaiian, and adds other state requirements. Pet. at 54a-55a.

(3) Article XII, Section 6 specifically confers on OHA trustees "the power to manage and administer all income and proceeds from that *pro rata portion of the trust* referred to in [Article XII, Sect. 4] for native Hawaiians. . . . " Pet. at 46a-47a.

The "pro rata portion" of the public land trust for native Hawaiians was not defined by the Admission Act or by any constitutional provision or amendment. In 1980, the legislature set the pro rata portion for native Hawaiians of the revenue from the public land trust at twenty percent. HRS § 10-13.5. Pet. at 54a. None of the other four purposes of the public land trust has an allocated pro rata percentage.

e. OHA Duties

The members of the OHA board serve as trustees for the twenty percent of the revenue of the public land trust established by § 5(f) of the Admission Act (and further defined in Art. XII, Sect. 4), which is earmarked essentially as a separate subtrust for the betterment of the conditions of native Hawaiians. *See* Art. XII, Sect. 6; HRS 10-13.5.

The members of the OHA board also serve as trustees for separate trust funds for the betterment of Hawaiians (including but not limited to native Hawaiians).[6] OHA

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[6] Art. XII, § 5 (OHA "shall hold title to all the real or personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians"); Art. XII, § 6 (OHA trustees "exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and

receives trust funds for Hawaiians from legislative appropriation rather than from the twenty percent of the revenue of the public land trust allocated for native Hawaiians. *See, e.g.*, 1997 Hawaii Session Laws, Act 240. The same OHA trustees administer both the trust for native Hawaiians and the trust for Hawaiians, and are elected by the combined beneficiaries of both trusts.

REASONS FOR DENYING THE WRIT

Certiorari is inappropriate because there is no conflict between the decision of the Ninth Circuit and any decisions of any other circuits (indeed, no other Circuit is likely to consider a question uniquely arising out of Hawaiian history), or any conflict with any decision of the Hawaii Supreme Court (petitioner does not suggest otherwise). Supreme Court Rule (S. Ct. R.) 10(a). Nor does the Ninth Circuit's decision directly conflict with any decision of this Court, S. Ct. R. 10(c), as this Court has not considered the application of *Morton* in the context of Hawaiians and native Hawaiians, let alone in a case where the underlying trust obligation to benefit those groups is unchallenged and thus presumed constitutional. And, as demonstrated below, there is not even an indirect conflict with this Court's decisions or their underlying rationales.

Finally, for two critical reasons, there is no important question of federal law presented in this case. S. Ct. R. 10(c). First, the only issue before this Court is the very narrow one regarding limiting voters to Hawaiians and

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Hawaiians"); HRS § 10-3(1) & (2) ("The purposes of [OHA] include (1) the betterment of conditions of native Hawaiians and (2) the betterment of conditions of Hawaiians. . . . "); Pet. at 51a.

native Hawaiians *when the underlying trust obligation to Hawaiians and native Hawaiians must be accepted as proper.*

Second, the question is so unique to Hawaii that the answer to the question will not impact any of the other 49 states of the Union. This is true not only because of the unique Hawaiian history underlying the federal and Hawaii state statutory and constitutional scheme, but also because none of the other states have any laws even remotely resembling the challenged Hawaii provisions. *Cf. New York v. O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari because the lower court holding brought "into question the constitutionality of a statute now in force in forty-two States. . . . "); *New York v. Ferber*, 458 U.S. 747, 749 & n.2 (1982) (noting that 47 states had similar statutes). In short, this case will have no effect outside the State of Hawaii.

Finally, for all the reasons given below, the Ninth Circuit correctly decided the narrow issue that was presented, first, on the basis of the unchallenged constitutionality of the underlying trust obligation, and second, because, in light of the similar historically rooted trust obligations undertaken by the United States government to both Indians and native Hawaiians, *Morton* and its progeny, not *Adarand* or *Croson*, are the appropriate guiding precedent.

For any one of these reasons, certiorari is inappropriate.

A. The Challenged Voter Qualification is Based on Legal or Political Status and Not Race; the Similarity of the History Behind the Trust Obligations to Hawaiians and Native Hawaiians and that to the Indians Brings this Case under the *Morton v. Mancari* Doctrine.

Petitioner does not challenge the constitutionality of the underlying trust obligation to Hawaiians and native

Hawaiians, or the similarly restricted administrative structure of OHA.[7]

When the entire longstanding trust structure is accepted in place – as petitioner does accept it – the limitation of the right to vote for OHA trustees to Hawaiians and native Hawaiians is not a racial classification at all. Rather, that line has been drawn between persons who are beneficiaries of the trusts and persons who are not.

Petitioner argues that under the Ninth Circuit's reasoning, if the governing body is charged with targeting benefits and services to a particular racial group, there is no limit to the number or types of racial voting restrictions a State can employ. Pet. at 15. First, if it is assumed that the "racial" group may constitutionally be the special

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[7] Specifically, petitioner does not challenge the designation of specific public lands as homelands for native Hawaiians in the HHCA, or as adopted by the State of Hawaii in its constitution pursuant to the compact of section 4 of the Admission Act. Petitioner does not challenge either the existence of the public land trust established by section 5(f) of the Admission Act or the purpose of the trust of the betterment of the conditions of native Hawaiians, or Article XII Section 4 of the Hawaii Constitution characterizing the public land trust "as a public trust for native Hawaiians and the general public."

Petitioner does not challenge the provisions of Article XII section 5 establishing OHA and conferring on it title to all the real and personal property held in trust for native Hawaiians and Hawaiians, and requiring that board members be Hawaiians, or the automatic allocation under HRS § 10-13.5 of twenty percent of the revenue of the section 5(f) public land trust for native Hawaiians. Petitioner does not challenge the purposes of OHA of the betterment of the conditions of native Hawaiians, and the betterment of the conditions of Hawaiians in HRS § 10-3, or the appropriation of general funds to OHA for the betterment of Hawaiians.

object of attention, as we must in this case, then limiting the voters to those who are within the beneficiary group is not shocking at all; indeed, it is common sense good policy. *Cf. Morton*, 417 U.S. at 554 (recognizing that the preference for Indians "further[s] the cause of Indian self-government," makes the governing body "more responsive to the needs of its constituent groups," and "is directed to participation by the governed in the governing agency."). Second, not any racial voting restriction was condoned by the Ninth Circuit, but, consistent with *Morton*, only one that fulfills historically rooted trust obligations to people of a formerly independent sovereign nation.

Morton, after all, applied the rational basis test because of "the unique legal status of Indian tribes under the federal law," and "the assumption of a 'guardian-ward' status," 417 U.S. at 551, which flowed from the "special relationship" between the United States and the Indians. 417 U.S. at 535-36. The root of this special relationship was described as follows:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others. . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

417 U.S. at 552. This Court concluded "[a]s long as the special treatment can be tied *rationally* to the fulfillment of Congress' unique obligation toward the Indians, such

legislative judgments will not be disturbed." 417 U.S. at 555.

The courts below properly applied the *Morton* rational basis standard to this case. The obligations of the federal government toward native Hawaiians parallel the obligations of the federal government toward Indian tribes and arise from the same shared history of dispossession and loss of sovereignty of indigenous peoples. The existence of the trust relationship with native Hawaiians is indisputable on the face of the Admission Act and under existing case law. *E.g., Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); *Price v. Akaka*, 3 F.3d at 1225 ("Congress enacted the Admission Act, a federal public trust. . . . ").

Second, the promulgation by Congress of legislation solely for the benefit of native Hawaiians and Hawaiians[8], and the inclusion of native Hawaiians (and often Hawaiians) in legislation promulgated primarily for the benefit of native American Indians[9], constitute further

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[8] *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7901 et seq.; the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441 (Program for Native Hawaiian and Alaska Native Culture and Arts); 20 U.S.C. § 7118 (allotting money for drug and violence prevention programs); 42 U.S.C. § 254s (Native Hawaiian Health Scholarship); 42 U.S.C. § 3057 et seq. (Native Hawaiian Health Program). These statutes extend benefits to "Hawaiians" as well as "native Hawaiians."

[9] Native Americans Programs Act of 1974 (*See* 42 U.S.C. § 2991 et seq.); American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); National Museum of the American Indian Act (20 U.S.C. § 80q et seq.); Native American Graves Protection and

compelling evidence of the continuing guardian-ward relationship between the federal government and native Hawaiians and Hawaiians. These statutes repetitively affirm the special relationship that exists between the United States and the native Hawaiian people, and the trust responsibilities and unique legal relationship of the United States to native Hawaiians.

Petitioner claims that the Ninth Circuit's decision means that states can enact racial preferences by simply prefacing their legislation with the designation of the preferred group as the beneficiary of a "public trust" or "special relationship" with the government. Pet. at 2, 11. This is wrong for two reasons. First, the Ninth Circuit's decision was limited to the unique situation where the underlying trust purpose to benefit native Hawaiians and Hawaiians must be accepted as proper; thus, the voter limitation to the same groups simply reflects the political, and nonracial, desire to limit the voters to the beneficiary class. Second, a legislature cannot simply designate preferred groups. Both *Morton* and the Ninth Circuit's decision in this case were rooted in a unique *history* of an aboriginal people, who were the former subjects of an independent sovereign nation, being taken over by a different sovereign nation, and whose displacement and resulting disadvantage was to be ameliorated by the conquering government's assumption of a trust obligation to

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Repatriation Act (25 U.S.C. § 3001 et seq.); National Historic Preservation Act (16 U.S.C. § 470 et seq.); the Native American Languages Act (25 U.S.C. § 2901 et seq.); the Indian Health Care Amendments of 1988 (25 U.S.C. § 1601 et seq.); 15 U.S.C. § 637 (Aid to Small Business); 20 U.S.C. § 1106b (Teacher Corps preferences); 42 U.S.C. § 3011 (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging).

these people. These historically-rooted and unique factors are plainly not ones that a clever state legislature could simply concoct at will.

1. Imposing a Tribal Requirement for *Morton* is Unjustified.

Petitioner wrongly narrows the scope of *Morton* to formally recognized tribes, Pet. at 17-20, by ignoring the critical portion of *Morton* that held that the primary reason the classification in *Morton* was political and not racial was not because of any tribal requirement, but rather, as stated by this Court:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

Morton, 417 U.S. at 554. Thus, the key reason the classification was not racial was not because of the formal tribal aspect but because the restriction was designed to further self-governance. While this Court did mention, in a footnote, 417 U.S. at 553 n.24, that the preference was given to only tribal Indians, and not all racial Indians, that actually supports the notion that the reason the restriction was political and not racial was because of the *self-governance* aspect. Why? Because the BIA positions for which the preference applied were those that "administ[ered] functions or services affecting any Indian *tribe*." *See* 417 U.S. at 537-38 (emphasis added). Thus, to give the preference to all racial Indians, even if they were not tribal Indians, would have actually undercut the self-

governance aspect that motivated *Morton*. That explains why this Court went on to say that the preference is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities *whose lives and activities are governed by the BIA* in a unique fashion." 417 U.S. at 554. In short, the tribal limitation was necessary because the BIA positions for which the preference applied governed *tribal* Indians. In this case, on the contrary, because OHA beneficiaries are *all* Hawaiians and native Hawaiians, without regard to any tribal classification, self-governance is promoted by allowing the voters to be all Hawaiians and native Hawaiians, regardless of any tribal status.

Another way to understand why there should be no artificial tribal requirement for Hawaiians is that for the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. Thus, because *Morton* turned upon the desire to promote Indian self-governance, it made sense to give the preference to only those Indians who were members of the formerly sovereign entity (i.e. the tribe), which meant only tribal Indians. Similarly, promoting Hawaiian self-governance is accomplished by giving the preference (here, the exclusive franchise in electing OHA trustees) to all those who were members of (or their descendants) the former sovereign nation. Because that former sovereign is the Kingdom of Hawaii, not any particular tribe or equivalent "political entity," all Hawaiians should qualify. The tribal concept simply has no place in the context of Hawaiian history.

And petitioner is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty

Clauses of the Constitution. Pet. at 19. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction. The Indian clauses simply *reflect* and *arise out of* the historical relationship; namely, the conquering of an aboriginal people who were the subjects of a formerly independent nation. The analogous historical relationship in the case of Hawaiians and native Hawaiians is reflected by the Annexation Act of 1898, the Organic Act of 1900, the Hawaiian Homes Commission Act of 1920, and the Admission Act of 1959. These Acts for Hawaiians and native Hawaiians are the equivalents of the Indian Commerce and Treaty Clauses for Indians discussed in *Morton*.

2. The *Washington* Case Does Not Support Petitioner.

Petitioner's argument, relying upon *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), that special treatment cannot be conferred by the *states*, as opposed to the federal government, *see* Pet. at 20-21, is specious. *Washington* specifically upheld a *state*-conferred special treatment of Indians (imposing a "checkerboard" pattern of state jurisdiction over nonconsenting tribes) because it was "enacted in response to a *federal* measure explicitly designed to readjust the allocation of jurisdiction over Indians." 439 U.S. at 501. Analogously, the entire OHA scheme (including the voter restriction) – designed to carry out trust obligations to native Hawaiians and Hawaiians – was enacted in direct response to *federal* statutes explicitly requiring the State of Hawaii to carry out or fulfill federal trust obligations to native Hawaiians. *See* Admission Act (requiring

Hawaii to manage 5(f) trust land for the "betterment of the conditions of native Hawaiians," among other purposes); *see also* Hawaiian Homes Commission Act (requiring Hawaii to distribute leases of land to native Hawaiians).

Petitioner's claim that the voter restriction was not *specifically* authorized by any federal law, Pet. at 21, ignores the plain fact, recognized for Indians in *Morton*, that by helping to ensure Hawaiian self-governance, the restriction does fulfill the specific federal authorization to better the conditions of native Hawaiians.

Petitioner's attempt to defeat this logic by noting that Hawaiians of less than 50% native blood are not the express beneficiaries of the Admission Act's command, Pet. at 21, rests upon a strained and cramped view of what betters the conditions of native Hawaiians. Hawaiians, after all, being necessarily the descendants of native Hawaiians, are the closest culturally to native Hawaiians and thus are the best proxies for native Hawaiians. Indeed, in time, there will be very few native Hawaiians left to receive the benefits of the trust obligation.[10] Because Hawaiians of less than 50% native blood are the people most culturally similar, and the closest relatives, to native Hawaiians, it is entirely reasonable for Hawaii to include all Hawaiians within the voting qualification, and to view that inclusion as serving the Admission Act's command to better the conditions of native Hawaiians.

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[10] In 1984, there were only 8244 one hundred percent Hawaiians. Of these, 5433 were 45 years old or older. OHA, Native Hawaiian Databook 1996, Table 1.16 at 34.

B. The Affirmative Action Cases of *Adarand* and *Croson* Are Not Controlling.

Petitioner's claim that *Adarand* and *Croson* make clear that classifications based solely on race are subject to strict scrutiny regardless of the particular race involved, Pet. at 22-23, is false. The mere fact that Native Americans or Indians were included in the prohibited preferences in those cases does *not* support petitioner's theory. For that specific group was only one out of many other racial groups that received equal benefit of the racial preference. Thus, because the affirmative action programs included groups other than Native Americans or Indians, it could not have been argued that the overall program fulfilled historical trust obligations, when most of the minorities benefited were not the beneficiaries of such obligations.

Moreover, not only do *Adarand* and *Croson* not involve historically rooted trust obligations, subject to the *Morton* line of cases, but they were not cases where it was *presumed* that the benefited groups could properly be singled out to receive the benefit. Instead, the Court in *Adarand* required that the case be sent back to determine whether the minorities could properly receive such a benefit. *Adarand*, 515 U.S. at 237-239. Here, on the contrary, it is presumed that the trust obligation to Hawaiians and native Hawaiians is permissible – because petitioner never challenged it – and thus, it must be assumed Hawaiians and native Hawaiians can properly receive a benefit. If anything, therefore, *Adarand* and *Croson* actually *support* the Ninth Circuit's conclusion in this case.

Petitioner's argument that the Ninth Circuit violated *Croson* by failing to consider "race-neutral" means of achieving the same goals is baseless. Pet. at 26-27. The

Ninth Circuit properly understood that fulfilling the goal of insuring proper management of the trust obligation to *Hawaiians* and *native Hawaiians* could not be done by race-neutral means. Indeed, this Court in *Morton* recognized this very fact by endorsing the Indian preference as necessary to Indian self-governance and to ensure that the BIA was "more responsive to the needs of its constituent groups." 417 U.S. at 554. In any event, *Croson* is wholly inapplicable to this case, which falls into the *Morton* line of cases, not the affirmative action jurisprudence.

C. Hawaii's Voting Restriction Rationally Serves the Interest of Bettering the Conditions of Native Hawaiians; in Fact, as the Ninth Circuit held, it Fulfills Hawaii's Compelling Interest in Honoring the Trust Obligation Imposed by Congress, and it Prevents the Extinction of an Entire Native Culture.

The voter restriction, by promoting Hawaiian self-governance, was rationally related to the state interest in complying with the Admission Act's command to better the conditions of native Hawaiians. As the district court succinctly stated:

> The State of Hawaii did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawaii merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians.

963 F. Supp. at 1555; Pet. at 37a. Again, it must be stressed that because the Admission Act's command that Hawaii

better the conditions of native Hawaiians was not challenged in this case, that command must be presumed constitutional.

The report of the 1978 constitutional convention confirms the rationality of the voting restriction:

> [A] board of trustees chosen from among those who are interested parties would be the best way to ensure proper management and adherence to the needed fiduciary principles. . . . [T]he board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society.

Proceedings at 644-45. Petitioner fails to provide any reason why the non-beneficiaries of the trusts should participate equally with the beneficiaries in selecting the trustees.

Moreover, the Ninth Circuit correctly held that the voting restriction would even survive strict scrutiny because it serves "the state's compelling responsibility to honor the trust," and "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.' " Pet. at 17a. In addition, Hawaii has a compelling interest in bettering the condition of native Hawaiians not only for the well-being of individual native Hawaiians, but because doing so will preserve what is left of the culture, tradition, and language of the pre-1778 inhabitants. The HHCA, the Admission Act, Article XII of the Hawaii Constitution, and HRS Chapters 10 and 13D all reflect the determination that the original Hawaiian heritage should be preserved from extinction.

In dismissing the Ninth Circuit's finding of a compelling state interest, petitioner claims that the State is not

compelled to administer its public trust lands "in a manner that differentiates away Hawaii[ ] citizens on the basis of race." Pet. at 24. This is absurd; the only way that Hawaii can fulfill its trust obligations to Hawaiians and native Hawaiians is by differentiating between citizens who are the beneficiaries versus those who are not. And although the beneficiaries may seem at first to be defined in racial terms, the real criteria is political; namely, those people (and their descendants) who were subjects of a formerly independent sovereign nation, and to whom the trust obligations run.

The mere fact that the 5(f) trust obligation does not run *exclusively* to the "betterment of the conditions of native Hawaiians," given the other four purposes, Pet. at 24-25, hardly suggests that the portion of the trust obligation to native Hawaiians can be ignored. Hawaii surely has a compelling interest in fulfilling that portion of its 5(f) trust obligation that does run in favor of native Hawaiians. Whether or not the state was fulfilling its 5(f) obligation to native Hawaiians from 1959 through 1978, Pet. at 25, is not the issue in this case. The only question is whether the state, from 1978 forward, has a compelling interest in honoring its 5(f) trust obligation to native Hawaiians.

Petitioner's suggestion that the Ninth Circuit's recognition that having the OHA board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles" is invalid and patently offensive, Pet. at 25, completely ignores the fundamental rule of *Morton*. *Morton*, after all, supports the Ninth Circuit's view by stating that the Indian preference was a "criterion reasonably designed to further the cause of Indian

self-government and to make the BIA more responsive to the needs of its constituent groups." 417 U.S. at 554.

Finally, petitioner wrongly argues that the voting restriction is not narrowly tailored because the majority of OHA voters are not native Hawaiians, but Hawaiians (of less than 50%). Pet. at 27. First, even petitioner concedes OHA administers a significant amount of money on behalf of Hawaiians who are not native Hawaiians. The trusts for native Hawaiians and Hawaiians administered by OHA are *separate* trusts separately funded. The same trustees administer both trusts and are elected by the combined beneficiaries of both trusts. Thus, allowing Hawaiians (of less than 50%) to vote *is* narrowly tailored. To exclude such Hawaiians would likely raise a claim by petitioner that the limitation was not narrowly tailored to serving OHA's separate obligation to Hawaiians.

In any event, as discussed earlier, "Hawaiians" do approximate "native Hawaiians" in that the former are necessarily descendants of the latter, and are thus most likely to be culturally and politically similar. Besides, petitioner should not be allowed to attack a voting requirement as improperly excluding people by arguing that it should have excluded even more people.

D. The Ninth Circuit Properly Ruled that Because Petitioner Did Not Challenge the Validity of the Underlying Trust Obligation to Native Hawaiians, the Courts Must Assume the Validity of That Trust Obligation when Deciding the Constitutionality of the Voting Restriction.

Because petitioner never challenged the underlying trust obligation to native Hawaiians, the Ninth Circuit

had no choice but to assume the validity of that obligation, if for no other reason than the fact that the record, developed solely to attack the *voting restriction*, could not sustain an attack on the underlying trust obligation. Petitioner to this day does not, and cannot, attack the constitutionality of that trust obligation. Therefore, the question petitioner wishes this Court to consider – the constitutionality of the voting restriction when the underlying trust obligation is also under attack – is simply not before this Court. For this reason alone, certiorari should be denied.

Petitioner argues that even assuming the validity of the underlying trust obligation to Hawaiians and native Hawaiians, it is improper for the state to "further" the "race discrimination" by limiting the right to vote. Pet. at 26, 29. He bases this claim on the wholly non-analogous situation of *private* discrimination that cannot be furthered by *state-action* agency enforcement. In *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230 (1957), for example, the private discrimination is not unconstitutional until it is enforced by a state entity, given the state action requirement. In our case, on the contrary, the underlying trust obligation to Hawaiians and native Hawaiians, which is presumed constitutional, from the start involves state action. Thus, the "furthering" of the trust obligation by limiting the voters to Hawaiians and native Hawaiians does not *add* a state action component and thus cannot create an unconstitutionality. The *Pennsylvania* case, therefore, is wholly distinguishable.

E. Because the OHA Election Falls Within the *Salyer* Special Purpose/Disproportionate Impact Election Doctrine, the Voting Restriction Does Not Violate Either the Fourteenth or Fifteenth Amendment.

In addition to the reasons set forth above, petitioner's claims fail because, as the courts below recognized, OHA serves a special limited purpose that disproportionately affects its electors, and is therefore excepted from the principle of one-person, one-vote. *See Salyer Land Co.*, 410 U.S. at 728 (1973) and *Ball v. James*, 451 U.S. 355, 370-71 (1981). The constitutional leeway for such elections is an aspect of *federalism* reflecting "the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities." *Ball*, 451 U.S. at 373 (Powell, J., concurring).

The test for special limited purpose turns on whether the entity exercises "general governmental powers" or whether its powers are "so far removed from normal governmental activities." *Ball*, 451 U.S. at 363. OHA lacks critical general governmental powers: it cannot enact laws, and has no regulatory or police power; and it has no power to impose taxes or to levy other assessments. In fact, OHA has virtually no control over its income. The money for *native* Hawaiians from the subtrust of the section 5(f) public land trust has been fixed by the legislature at twenty percent. HRS § 10-13.5. Pet. at 54a. The money for the trust for *Hawaiians* is set by legislative appropriation. Petitioner, through his elected state representatives, has the same degree of influence in these decisions as native Hawaiians or Hawaiians. In *Ball*, 451 U.S. at 371 n.20, this Court noted that the non-voters "remain equal participants in the election of the state

legislators who created and have the power to change the District."

OHA acts as a disbursement agent or conduit for the monies it receives but, because the core function of OHA is to manage and administer the trusts for native Hawaiians and Hawaiians, OHA's disbursement activities are subject to the stringent legal controls of trust law.

OHA's powers are far less general, and far more removed from normal government activities than the entities in *Salyer* or *Ball*. Unlike OHA, the water district in *Salyer* had an assessment power as well as broad power to issue general obligation bonds. OHA, like the water district, does not provide "general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." 410 U.S. at 728-29. OHA has no involvement in the funding or operation of the State of Hawaii's general public services.

Finally, petitioner cannot plausibly argue that the activities of OHA do not disproportionately affect the beneficiaries of the trusts it administers. Petitioner complains that the Ninth Circuit improperly extended *Salyer* to a state agency that expends general tax revenues. Pet. at 16. First, OHA does *not* expend general tax revenues for exclusively *native* Hawaiians, but instead uses the land (and its proceeds) from the public land trust that was created by the Admission Act. Second, even if general tax revenues are used to benefit *Hawaiians*, the only relevant issue under *Salyer* is whether OHA's actions disproportionately affect Hawaiians. 410 U.S. at 727-28; *Ball*, 451 U.S. at 371. The mere fact that general revenues are used does not change the fact that Hawaiians are obviously disproportionately affected by how OHA

spends that money.[11] That the funds may come from general tax revenues is especially irrelevant when we must presume the constitutionality of using general tax revenues to benefit only Hawaiians, since petitioner never challenged that allocation.[12] *See supra*, footnote 7.

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[11] In short, although the source of the revenue (from all Hawaii taxpayers) does not demonstrate disproportionate impact, it is beyond dispute that the *expenditure* of the revenue to better the condition of Hawaiians disproportionately impacts Hawaiians. *See Ball*, 451 U.S. at 371 (distribution of *benefits*, as well as burdens, is relevant to disproportionate impact analysis).

[12] Petitioner's Fifteenth Amendment claim fails for the additional reason that he did not show the required discriminatory intent. *Mobile v. Boulden*, 446 U.S. 55, 62 (1980). Unlike claims under the Voting Rights Act of 1965, which petitioner abandoned, the Fifteenth Amendment does require proof of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 392-95 (1991). There simply was no illicit racially discriminatory purpose on the part of the State of Hawaii. Rather, Hawaii's establishment of OHA, allocating 20 percent of the public land trust revenues for native Hawaiians, and designating the beneficiaries to select the OHA trustees, simply reflect the nondiscriminatory purpose of complying with and implementing the Admission Act's command to better the conditions of native Hawaiians.

The legislative history makes clear that the purpose of the voter restriction was to ensure that "people to whom assets belong should have control over them" and that "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." *Proceedings* at 644. The limitation of the right to vote for OHA trustees to native Hawaiians and Hawaiians merely reflects the *legal status* of native Hawaiians and Hawaiians as the only beneficiaries of the trusts administered by OHA, the only persons to whom the OHA trustees owe a duty of loyalty, and the only persons to whom the OHA trustees are accountable for breaches of

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

DATED: Honolulu, Hawaii, December 29, 1998.

Respectfully submitted,

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fiduciary duty. In sum, limiting the vote to native Hawaiians and Hawaiians is based not on race, but on the legal status of native Hawaiians and Hawaiians as the sole beneficiaries of the trusts administered by the elected OHA trustees.

APPENDIX

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever. . . .

* * *

§ 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provisions of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether

made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

HAWAIIAN HOMES COMMISSION ACT, 1920

* * *

TITLE 2: HAWAIIAN HOMES COMMISSION

§ 201. [Definitions.] (a) That when used in this title:

(1) The term "commission" means the Hawaiian Homes Commission;

(2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;

(3) The term "fund" means the Hawaiian home loan fund;

(4) The term "State" means the State of Hawaii;

(5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;

(6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract;

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;. . . .

* * *

§ 202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. . . .

* * *

§ 203. Certain public lands designated "available lands." All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres . . . .) [etc.] . . . .

* * *

§ 204. Control by department of "available lands," return to board of land and natural resources, when; other lands, use of. (a) Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the

department to be used and disposed of in accordance with the provisions of this Act, except that:. . . .

* * *

§ 207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that. . . .

* * *

§ 208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; except that . . . .